IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA		
	:	**CRIMINAL ACTION**
	:	
v.	**:**	
	:	
DARIUS ARCHIBALD	**:**	**NO. 02-335-1**

MEMORANDUM AND ORDER

Schiller, J. **February , 2003**

I. INTRODUCTION

The government has charged Defendant Darius Archibald with various possessory crimes involving narcotics and firearms. Trial commenced in this matter on January 6, 2003. On January 9, 2003, finding that the jury had been irreparably prejudiced by the government's misconduct, this Court declared a mistrial. Presently before the Court is Defendant's motion to bar retrial pursuant to the Double Jeopardy Clause of the Fifth Amendment. For the reasons set forth below, I find that the facts present in this case do not sufficiently support an inference of prosecutorial intent to provoke a defense motion for mistrial and, thereby, subvert the Defendant's double jeopardy rights. Thus, I deny Defendant's motion.

II. BACKGROUND

The government's case against Darius Archibald arises from events that allegedly occurred on December 16, 2000. Shortly after midnight on that date the Philadelphia Police Department responded to a private security alarm sounding at 123 West Sparks Street in Philadelphia, Pennsylvania. (Gov't Trial Mem. at 2.) The first officers to arrive at the property found that the rear door had been sawed in half, suggesting a burglary. (*Id.*) The officers made a

protective sweep of the property and discovered no persons in the premises. (*Id*. at 2-3) The officers did find, however, drugs, drug paraphernalia, cash in bundles, and a semiautomatic pistol with a fifty round capacity. (*Id*. at 3) A short time later, Defendant Darius Archibald and another individual arrived at the property in a vehicle, which Mr. Archibald parked a short distance away. (*Id*.) Mr. Archibald indicated to the officers that he owned the property, whereupon he was immediately arrested. (*Id*. at 3-4.) Over the next several hours, more officers arrived and the property was repeatedly searched (*Id*. at 3-7.) The police recovered several items from the property, including more drugs, drug paraphernalia, a variety of guns, and cash. (*Id*. at 5-7.) The police also recovered two handguns from inside of Mr. Archibald's vehicle. (*Id*. at 5.)

On June 6, 2002, a federal grand jury issued a six-count indictment charging the Defendant with violations of federal narcotics and firearms laws. The charges included possession of firearms by a convicted felon, possession of firearms in furtherance of a drug trafficking crime, possession of narcotics with intent to distribute, and drug trafficking within 1000 feet of an elementary school.

Trial in this matter began on January 6, 2003.[1] From the outset, the issue of whether Mr. Archibald resided at 123 West Sparks played a major role in the case. The prosecutor's opening remarks included the statement, "the home of Darius Archibald is at 123 West Sparks Street." (Jan. 7, 2003 Tr. at 30.) Defense counsel continually emphasized that mere ownership of a house does not equate to possession of its contents. (*See, e.g., id*. at 46.)

Officer James Kelly was one of the first officers to arrive at the property on December 16,

[1] As a preliminary matter, the Court denied Defendant's motion to suppress certain items of evidence recovered from an automobile driven by Mr. Archibald and parked near the 123 West Sparks property on December 16, 2000.

2000. On January 7, 2003, Officer Kelly testified that on the evening in question, he had run the Vehicle Identification Number and license plate of the vehicle driven by Mr. Archibald through his mobile police computer to obtain information about the vehicle's owner. (*Id*. at 73-74.) Officer Kelly testified that the computer had indicated that the vehicle was registered to Mr. Archibald, but that he could not recall the address the computer had indicated for Mr. Archibald. (*Id*. at 74.) On cross-examination and re-direct, both counsel devoted much attention to the possibility that the vehicle might have been registered to an address on Magee Avenue. (*Id*. at 96-99, 122-124, 133.) The prosecution, in particular, elicited testimony from Officer Kelly that he had indicated on a police report that the vehicle driven by Mr. Archibald was registered to the 123 West Sparks address. (*Id*. at 122-123.)

Officer Thomas Kelliher, who had conducted the protective sweep, testified that he found a cellular telephone bill in the house addressed to Mr. Archibald at 123 West Sparks. (Jan. 8, 2003 Tr. at 8.) He also testified that when he had questioned Mr. Archibald about his address, Mr. Archibald gave the West Sparks address. (Jan. 7, 2003 Tr. at 141.) The prosecution asked Officer Kelliher to identify a Pennsylvania driver's license bearing Mr. Archibald's full name, photograph, and the 123 West Sparks address, which he did. (Jan. 8, 2003 at 38.) As the defense counsel's cross-examination revealed, however, neither the prosecution nor the officer noted that the license had expired on October 31, 1998, more than two years prior to Mr. Archibald's arrest in connection with this matter.

On re-direct, the prosecutor introduced two police patrol logs from the early morning hours in question. One of the logs belonged to Officer Kelliher and the other belonged to Officer Lee Datts, who was present at the property and who had testified earlier. The prosecutor

indicated that defense counsel had not previously seen these documents because they had just arrived from records storage. (*Id*. at 127.) The Court delayed the introduction of the logs to give the Defendant an opportunity to review them. At the conclusion of re-direct, the Defendant moved to exclude the patrol logs. The newly produced documents were unduly prejudicial, he argued, because they refuted an aspect of his defense that had been constructed before he could become aware of these documents. (*Id* at 143.) The Court excluded both documents. (*Id*. at 157.)

On January 8, 2003, the government called to the stand the Detective assigned to this case, James Sloan. Detective Sloan testified that he had procured a search warrant for 123 West Sparks and had subsequently searched the property, taken photographs, and recovered various items. During direct examination, the prosecutor asked Detective Sloan to identify several of the documents he had recovered from the property. These included (1) a mortgage "payoff quote," dated October 19, 2000 and addressed to Mr. Archibald at 123 West Sparks as the mortgagor of the property at that address; (2) a Water Revenue Bill bearing a due date of October 30, 2000 and addressed to Mr. Archibald at 256 West Ashdale; (3) two Germantown Hospital delinquency notices dated July 29 and 30, 2000, respectively, each addressed to Mr. Archibald at 2000 West Godfrey Avenue; (4) a Fleet Mortgage Group mortgage offer dated August 12, 2000 and addressed to Mr. Archibald at 5214 North Front Street.[2] Defense counsel noted that, of the documents introduced during the examination of Detective Sloan, he had received only the

[2] According to Defendant, the prosecutor also turned over to the defense on either January 8 or 9, 2003, a money order receipt dated August 12, 2000 bearing Mr. Archibald's name and the Godfrey Avenue address and a statement from Interstate Credit and Collection Incorporated dated August 12, 2000 and bearing the Godfrey Avenue address.

mortgage "payoff quote" with the West Sparks address.[3] (*Id*. at 265.) The prosecutor also began to ask Detective Sloan about Mr. Archibald's expired license, but I foreclosed that line of questioning. (*Id*. at 270.)

After the jury was dismissed, defense counsel requested that the prosecution supply him with "all of the paperwork on this case," (*Id*. at 276). The Court instructed the prosecution to produce for the defense any relevant documents or other evidence, and admonished the prosecutor that repeated failure to turn evidence over could "reach[] a point where it gets to be prejudicial." (*Id*. at 276-281.)

The next day, immediately following Defense counsel's conclusion of his cross-examination of Detective Sloan, the prosecution produced copies of documents not previously disclosed to defense counsel. These documents included a printout from the Pennsylvania Bureau of Motor Vehicles ("BMV") indicating that, as of June 14, 2000, Mr. Archibald possessed a valid driver's license and that his address was 2122 Magee Avenue/P.O. Box 46874. (Jan. 9, 2003 Tr. at 71.) The documents, arranged in an accordian-folded printout, had been generated by Detective Sloan during the early morning hours of December 16, 2000. (*Id*. at 73.) They included a facsimile dated January 8, 2003 requesting a photograph license of Mr. Archibald, and other information indicating several addresses for Mr. Archibald.

After some discussion between the Court and counsel, Defendant made an oral motion for a mistrial with prejudice. The government objected forcefully, suggesting that the Court permit cross-examination or provide a curative instruction and indicating that it was prepared to

[3] Detective Sloan had referenced three of these documents on a property receipt that, according to the Government, had been turned over to Defendant.

stipulate to the late production of exculpatory evidence that had been in its possession since December 16, 2000. (*Id*. at 83-91.)

The Court conducted voir dire of Detective Sloan regarding the BMV documents. His testimony revealed that he had provided these documents to the prosecutor at least two months before trial and that he personally observed the prosecutor examine the file that contained them. (*Id*. at 93-94.) The prosecutor represented that he did not recall seeing the documents during his examination of the file. (*Id*. at 95.) He further represented to the Court that if he had known that Mr. Archibald's current license listed the Magee Avenue address, he would not have presented the government's case in the way that he had regarding the location of Mr. Archibald's residence. (*Id*. at 98.)

Finding that the government had elicited testimony to the jury regarding Mr. Archibald's address that it had reason to know was incorrect, had repeatedly demonstrated a failure to turn over evidence to defense counsel, and, thereby, had irreparably prejudiced the Defendant, the Court granted Defendant's oral motion for mistrial. The Court reserved judgment on the issue of whether to bar retrial and ordered both parties to file memoranda on the issue.

III. DISCUSSION

A. Double Jeopardy Analysis

The Double Jeopardy Clause of the Fifth Amendment states: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. v. This Constitutional protection against double jeopardy secures a defendant's "valued right to have his trial completed by a particular tribunal." *United States v. Coleman*, 862 F.2d 455, 457

(3d Cir. 1988) (*quoting Wade v. Hunter*, 336 U.S. 684, 689 (1949)). This right is valued and protected because, "independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial." *United States v. Jorn*, 400 U.S. 470, 485 (1971). Thus, where prosecutorial error has occurred, such that the defendant faces a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error, "[the] important consideration . . . is that the defendant retain primary control over the course to be followed in the event of such error." *United States v. Dinitz*, 424 U.S. 600, 609 (1976).

In accordance with this reasoning, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution. *United States v. Jorn*, 400 U.S. 470, 485 (1971); *United States v. Tateo*, 377 U.S. 463, 467 (1964). However, "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal," the Supreme Court has recognized an exception to this general rule. *Jorn*, 400 U.S. at 485, n.12; *see also Tateo*, 377 U.S. at 468, n.3 (noting that judicial or prosecutorial impropriety motivated by fear of acquittal might provide basis for barring retrial where defendant had moved for mistrial).

Under *United States v. Dinitz*, the analysis employed in such cases centered on whether the prosecution engaged in misconduct to "goad" the defendant into moving for mistrial or to prejudice his possibility of obtaining an acquittal. 424 U.S. at 611. Concerned that *Dinitz* would permit Courts to "broaden the test from one of *intent* to provoke a motion for mistrial to a more generalized standard of 'bad faith conduct' or 'harassment'" the Court, in *Oregon v. Kennedy*,

circumscribed the analysis. 456 U.S. 667, 674 (1982) (emphasis in original). Specifically, the *Kennedy* Court held that a defendant may raise the double jeopardy bar to retrial "*only* where the government conduct in question is intended to 'goad' the defendant into moving for a mistrial." *Id.* at 676. (emphasis added.); *see also Coleman*, 862 F.2d at 457-58; *United States v. Curtis*, 683 F.2d 769, 776 (3d Cir. 1982); *United States v. Huang* 960 F.2d 1128, 1133 (2d Cir. 1992) (holding that gross negligence by prosecution will not suffice to bar retrial); *Johnson v. Vaughn*, Civ. A. No. 97-230, 1998 U.S. Dist. LEXIS 210 at 13, 1998 WL 13307 at *5 (E.D. Pa. Jan. 15, 1998) (noting that negligence by prosecution will not suffice to bar retrial). Therefore, the question before the Court is whether the an intent to provoke the defense into moving for mistrial can be inferred from the misconduct of the government in this case.[4]

B. Prosecutorial Intent to Provoke a Motion for Mistrial

While announcing a rule that requires courts to "infer[] the existence or non-existence of intent from objective facts and circumstances," 456 U.S. at 675, the *Kennedy* Court did not specify factors that might guide the lower courts in such an analysis. Several Circuit Courts, however, have considered the following factors: (1) whether the prosecution had reason to believe the jury might acquit the defendant; (2) whether the government stood to gain from a mistrial; and (3) whether the prosecution proffered some plausible justification for its actions.[5]

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[4] As Justice Stevens observed in his concurrence in *Kennedy*, defendants in Mr. Archibald's position bear a mighty burden in convincing the Court to answer this question in the affirmative. *See* 456 U.S. at 688 ("It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant.")

[5] Relying on *United States v. Benson*, 1993 U.S. App. LEXIS 30435 (9th Cir. 1993) (unpublished), Defendant suggests that in *United States v. Lun*, 944 F.2d 642, 646 (9th Cir. 1991) the Ninth Circuit endorsed an additional inquiry into whether "the government committed

See Curtis, 683 F.2d at 777-78; *see also United States v. Wharton*, ___ F.3d ___ , Crim. A. No. 01-30998, 2003 U.S. App. LEXIS 1843, at *9-10, 2003 WL 231299, at *3-4 (5th Cir. Feb. 4, 2003) (considering whether prosecution's case was going badly); *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993) (considering whether the trial was going badly for the prosecution and whether the prosecution offered a plausible explanation for its actions); *United States v. Lun*, 944 F.2d 642, 644-45 (9th Cir. 1991) (considering whether prosecution's case was going badly, whether prosecutor believed he would be better off starting a new trial, and what advantages would accrue to government through retrial.)

1. Prosecution's Reason to Believe Jury Might Acquit

With regard to the first factor, Defendant contends that the case was going poorly for the prosecution insofar as it had become clear that the Defendant did not live at 123 West Sparks and the key government witnesses had damaged their credibility. Defendant's contention is debatable, however, in light of the fact that the jurors had heard and seen evidence that Mr. Archibald signed a property receipt for the cash recovered from the property. They also heard Officer Kelliher testify that Defendant told him that his address was 123 West Sparks.

On the one hand, contradictions exist in the testimony of the officers involved in the investigation with regard to the timing of their arrival, the location of certain officers and the positioning, discovery, and manipulation of certain evidence in the West Sparks property. On the other hand, to the extent such contradictions had called the witnesses' credibility into question,

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repeated acts of misconduct which deprived defendant of primary control over whether to request a mistrial." The *Lun* Court, however, expressly declined to adopt such an inquiry because, as presented, it failed to satisfy the *Kennedy* Court's interest in the subjective intent of the prosecutor. 944 F.2d at 646.

they do not seem capable of impacting the jury's understanding of evidence showing that the property contained drugs, drug paraphernalia, cash, guns and items that appeared to belong to Mr. Archibald. Also, little doubt could have existed in the jurors' minds with regard to Mr. Archibald's possession of the guns recovered from his vehicle.

More importantly, the relevant inquiry deals with the government's perception of the likelihood of acquittal. As noted, the issue of where Mr. Archibald resided was of great importance to both sides. As a result, the Court's admonishment of the government for its repeated inconsistencies, omissions, and unclear memories of witnesses with respect to Mr. Archibald's address may well have generated the perception in the government's mind that the case was going so poorly that the jury might acquit the Defendant.

2. Advantages to Prosecution of Retrial

With regard to the second factor, Defendant argues that, in the event of retrial, the government gains a tactical advantage at retrial of having seen his defense, and Defendant will be forced to expend additional resources and possibly be prevent from retaining his counsel from the original trial. While these observations are true, they are balanced by advantages gained by the Defense at retrial. As the Ninth Circuit wrote in *U.S. v. Lun*:

> Time to regroup and regain control, and the opportunity to soften the negative impact of damaging evidence by defusing it in opening statement, is a fringe benefit of retrial for the government. Yet, there are disadvantages as well. "If the defendant consents to a mistrial, the prosecutor must go to the time, trouble, and expense of starting all over with the criminal prosecution." *Kennedy*, 456 U.S. at 686, 102 S. Ct. at 2095 (Stevens, J., concurring)
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> Additionally, defendants benefit by retrial. They have had the opportunity to see a substantial portion of the government's case-in-chief. They will also have the opportunity to portray the surprising incidents of the first

trial in the most beneficial way for their position, from the very outset.

944 F.2d 642, 646 (9th Cir. 1991). At retrial, the defense will have the opportunity to make use of all of the exculpatory material that it was denied in the original trial.

3. Prosecution's Explanation of Misconduct and Objection to Retrial

With regard to the third factor, the prosecution both objected strongly to the grant of a mistrial, and offered a plausible explanation of the late arrival of the evidence. As noted, the government offered a series of alternatives to mistrial and even indicated that it was prepared to stipulate to the late production of exculpatory evidence that had been in its possession since December 16, 2000. *See Lun*, 944 F.2d at 645 (considering fact of prosecution's vigorous objection to mistrial). While Detective Sloan's testimony revealed that he had given the BMV documents to the prosecutor at least two months before trial and that he personally observed the prosecutor examine the file that contained them, the prosecutor represented that he did not recall seeing the documents during his examination of the file, and citing accordion-folded nature of the documents as a possible reason for his oversight. The government also notes that the BMV documents, unlike other documents in this case, were not contained in the report filed by Detective Sloan, and that Detective Sloan called the prosecutor's attention to these documents on January 8, 2003, well after the close of trial for the day. At that point the prosecutor directed Detective Sloan to make copies that could be turned over to the defense. I find this version of events unnerving, but plausible.[6]

[6] The fact that the presentation of evidence by the government – from Officer Kelly's failure to remember Mr. Archibald's address to the prosecutor's repeated efforts to refute the possibility that Mr. Archibald had multiple addresses to the late arrival of evidence – consistently served to diminish the jury's awareness of Mr. Archibald's multiple addresses and, consequently,

4. Nature of Misconduct in This Case [7]

The circumstances present at trial could support an inference that the prosecutor was at least indifferent[8] to his duty to not "goad" the defendant into moving for mistrial. As noted,

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raises questions about the conduct of the officers and the prosecution at trial.

[7] I note that in cases where repeated instances of prosecutorial misconduct are found to have prejudiced the defendant, a mere application of the three factors culled from Circuit Court opinions and discussed above may not fully satisfy the *Kennedy* inquiry in to prosecutorial intent. In cases involving repeated misconduct, the prosecution may simultaneously harbor a conscious disregard for the defendant's right to a fair trial *and* a conscious disregard for the defendant's "valued right" that manifest themselves in the same series of acts. An isolated case of misconduct, unless it is egregious, will neither prompt a successful defense motion for mistrial, nor greatly prejudice the defendant. Such misconduct is thus of little use to the prosecutor who hopes either to provoke a successful defense motion for mistrial or to prejudice the defendant. Repeated misconduct, on the other hand, ensures a prosecutor will accomplish one or the other of these goals. This is so because if the defendant chooses not to move for mistrial, the prosecution has successfully prejudiced his case. If the defendant chooses to move for mistrial, the prosecution can respond by objecting vigorously. If the objection carries the day and mistrial is denied, the prosecution will again have accomplished its prejudice goal. If the mistrial is granted, the prosecution will have insured against the negligible risk that retrial will be barred, and it will have accomplished its provocation goal.

[8] Although I have found no case that explicitly defines "intent" under *Kennedy*, earlier Third Circuit caselaw provides some guidance. In *Government of Virgin Islands v. Scuito*, 623 F.2d 869 (3d. Cir. 1980), decided before *Kennedy* but after *Dinitz*, the Third Circuit discussed the mental state that must accompany prosecutorial misconduct to bar retrial. The Third Circuit noted that under *United States v. DiSilvio*, 520 F.2d 247, 250 (3d Cir. 1975), prosecutorial misconduct must be "intentional," and not simply negligent, regardless of the level of the negligence, to bar retrial. *Scuito*, 623 F.2d at 872, n.8. The court ultimately noted, however, that "the distinguishing characteristic, to the extent one may be found, seems to be whether or not the indifference to a prescribed standard of conduct was conscious or intentional." *Id*. at 873, n.10. Thus, "conscious disregard" may satisfy the Third Circuit's definition of "intent" in this context.

First Circuit caselaw applying *Kennedy* may also support the use of such a standard. In *United States v. Larouche Campaign*, the First Circuit considered whether there was "any form of egregious or unfair behavior that could be considered, objectively, as equivalent to an intentional effort to provoke a mistrial." 866 F.2d 512, 518 (1st Cir. 1989). The First Circuit adopted the district court's inquiry into whether "an ordinarily prudent person in the position of the prosecution . . . should have foreseen that its conduct would cause or contribute to a mistrial or goad the defendants into seeking a mistrial."

before January 9, 2003, the Court repeatedly admonished the prosecution for its failures in turning over evidence to the defense. On January 8, 2003, the Court went so far as to tell the prosecutor, "you know ultimately when things get so bad, there is only one sanction left." (Jan. 8, 2003 Tr. at 279.) Detective Sloan brought the existence of more exculpatory material to the prosecution's attention after the Court had adjourned, and Detective Sloan was directed to copy the materials so that the prosecutor could turn them over to the defendant early the following morning. January 9, 2003 began with an extended discussion between the Court and counsel regarding the production of evidence by the government. Yet at no time during this discussion did the government bring to light the information that it had learned from Detective Sloan the night before. It was not until the conclusion of defense counsel's cross-examination, when the court ordered a break in the proceedings and briefly excused the jury, that the government provided the documents to defense counsel, and even then failed to provide an explanation for their late arrival until defense counsel raised the issue. Given the repeated, intense discussion of the government's document production, the centrality of the issue to which the documents related, and the evidentiary weight of the documents, it is difficult to believe that the prosecutor expected the defendant to passively accept the documents.[9] The current law, however, demands a showing of intent to provoke, not merely indifference to the risk that such provocation may

[9] While recognizing that the inquiry under *Kennedy* focuses exclusively on the intent of the prosecutor, I believe it is also worth noting that one cannot say that Mr. Archibald "retain[ed] control over the course to be followed in the event of [prosecutorial] error." Kennedy, 456 U.S. at 676 (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976). Mr. Archibald confronted a series of errors and omissions by the prosecution, all capable of biasing the jury on a crucial issue in the case. He thus faced a "Hobson's choice" between proceeding in the hope that the errors and omissions could be employed to impeach the credibility of the government witnesses and, thereby, remove the taint from the jury or moving for mistrial.

occur. Considering all the facts and circumstances, I conclude that such an intent was not definitively proven in this case. I can only wonder, however, when behavior as here will cross the line into such recklessness that permits an inference of intent.

It is worth stating that the existence or non-existence of a *Brady* violation is not dispositive in this matter.[10] The Third Circuit has already held that the Double Jeopardy Clause "may not be relied upon to remedy a *Brady* violation." *Coleman*, 862 F.2d at 458. At issue here, however, is more than merely a *Brady* violation. Rather, this matter requires me to consider whether any of several instances of late disclosure of evidence that included a failure to disclose *Brady* material evince an intent on the part of the prosecution to provoke a motion for mistrial. As noted, I conclude that they do not.

Accordingly, I deny Defendant's motion for mistrial with prejudice and will permit

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[10] The government devotes substantial effort to demonstrating the absence of a *Brady* violation at trial. Since such an argument cannot assist the government with respect to the double jeopardy issue now before me, I am at a loss as to the government's reasoning. In any case, the decision to grant mistrial based on my perception of the prejudicial effect of a statement or evidence on the jury is well within my discretion. *See United States v. Mendez*, 117 F.3d 480, 484 (11th Cir.1997) (quoting *United States v. Satterfield*, 743 F.2d 827, 848 (11th Cir.1984)); *Harpster v. Ohio*, 128 F.3d 322, 330 (6th Cir. 1997) ("the decision of a trial court to declare a mistrial based on potential juror bias is entitled to special respect"); *see also Arizona v. Washington*, 434 U.S. 497, 511, 54 L. Ed. 2d 717, 98 S. Ct. 824 (1978) ("the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by [an] improper comment"); *United States v. Pavloyianis*, 996 F.2d 1467, 1472 (2d Cir. 1993) ("The trial court's discretion in this area is broad.") At trial, as noted, I found that the series of errors and omissions by the prosecutor and government witnesses, which occurred despite my repeated warnings to the prosecution during the course of trial, irreparably prejudiced the jury, so as to warrant a mistrial. Nothing more, including a finding of an actual *Brady* violation, was needed.

retrial.[11]

IV. CONCLUSION

The Supreme Court's command is clear: the Double Jeopardy Clause will bar retrial in cases of prosecutorial misconduct only where the defendant can show that the prosecution intended to provoke the defendant into moving for mistrial. *See Kennedy*, 456 U.S. at 676. Here, based on the above analysis of objective factors, I find that such obvious intent was not present in this case. Accordingly, and for the reasons stated above, I deny Defendant's motion. An appropriate order follows.

[11] If this were a civil case, I would have no compunction in assessing costs against a law firm that behaved as the government did in this case. The law, however, would require me to impose such a sanction against the prosecutor personally and I am hesitant to take such a punitive measure against one individual. It is my distinct hope and expectation that the government will in the future refrain from the sort of misconduct that characterized its prosecution of this case and will take appropriate steps specifically here.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA		
	:	**CRIMINAL ACTION**
	:	
v.	**:**	
	:	
DARIUS ARCHIBALD	**:**	**NO. 02-335-1**

O R D E R

AND NOW, this day of **February, 2003**, upon Defendant's oral motion for mistrial with prejudice, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's oral motion for mistrial with prejudice is hereby **DENIED**.

2. Retrial on charges contained in the original indictment shall commence on **March 3, 2003** at **10:00 a.m.**

BY THE COURT:

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Berle M. Schiller, J.